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81-1023

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 359, UNITED SEAFOOD WORKERS, SMOKED FISH AND CANNERY UNION,

Petitioner,

– v. –

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(11712)

Question Presented

Whether 29 U.S.C. §186 imposes strict criminal liability, thus permitting a conviction in the absence of proof of conscious wrongdoing and despite excluded proof tending to show reliance upon advice of counsel.

Parties to the proceeding in the Court of Appeals are:

The United States of America; and Local 359, United Seafood Workers, Smoked Fish and Cannery Union.

Pursuant to Rule 28.1, Petitioner states that it is a labor union with no parent companies or subsidiaries. It is affiliated with the United Food & Commercial Workers International Union, AFL-CIO & CLC.

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LOCAL 359, UNITED SEAFOOD WORKERS, SMOKED FISH AND CANNERY UNION,

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UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 30, 1981.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit has not been and (since "informal") will not be officially reported. It is bound with this Petition as the Addendum.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 30, 1981. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The pertinent provisions of 29 U.S.C. §186 (The [Taft-Hartley] Labor Management Relations Act of 1947, §302) are as follows:

> §186. Restrictions on financial transactions
>
> (a) It shall be unlawful for any employer . . . to pay . . . or agree to pay . . . any money . . .
>
> . . . .
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce. . . .
>
> . . . .
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.
>
> . . . .
>
> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

STATEMENT

Petitioner was tried upon an indictment alleging forty-six violations of 29 U.S.C. §186(b). It conceded at trial that it had been involved in a business affecting interstate commerce and that the forty-six employers mentioned in the indictment (one

per count) employed its members. From about mid-1975 through December of 1980, Petitioner received various sums of money from various employers who had participated in a plan whereby an employer would lease an inexpensive Union plaque from Petitioner at a rate of twenty-five dollars per month. All told, the employers made aggregate payments of $66,450.00 to Petitioner.

Petitioner conceded all the facts necessary to sustain a conviction, save one—that its receipt of the moneys from the employers was wilful within the meaning of 29 U.S.C. §186(d).

It was Petitioner's position at trial—a position supported by the evidence[1]—that its violation of Section 186(b) was in good faith with neither knowledge of nor reckless disregard for the statute, and was therefore not wilful. It was the Government's position that good faith, however persuasively proved, was no defense at all and that a violation of the statute was made out by a mere showing that Petitioner knowingly received payments from those who it knew employed its members.

Pursuant to its theory of the reach of the statute, Petitioner asked the trial court to instruct the jury as follows, in its proposed charges 10 to 14:

> 10. To find Local 359 guilty, you must find beyond a reasonable doubt that Local 359, its officers, or agents deliberately violated the section of law charged or that those parties recklessly disregarded that provision of law.
>
> 11. The minimum proof of this element needed to convict is that the defendant showed a reckless disregard for the provisions of §186.

---

[1] No effort whatsoever was made to conceal the fact that plaque rental payments were being received. The plan was mentioned in the minutes of one of Petitioner's executive board meetings and was contained in a never-hidden written lease agreement. Rental payments were made by check and records were kept reflecting the various payments. All the documents reflecting the plan—from origin to execution—were preserved and were later available for Governmental inspection. All moneys received went into the union coffers.

> 12. Whether or not Local 359 was reckless is a matter for you to determine from all the facts and circumstances disclosed by the evidence.
>
> 13. Reckless conduct, in this context, consists of two elements: knowledge of the important facts relating to the forbidden conduct, and knowledge that this conduct is likely to be illegal. The first element—knowledge of the facts—should be ascertained by your determination of whether Local 359 had actual knowledge of the conduct in question. The second element—knowledge of probable illegality—should be determined by your finding of whether a reasonable man, in the shoes of Local 359, its officers, or agents, would have been aware that the rental of plaques to employers would likely be illegal.
>
> 14. In other words, if you have a reasonable doubt as to whether Local 359, its officers, or its agents acted without making a reasonable effort to determine whether their conduct violated the law, you must vote to acquit.

The trial court declined so to charge.

In its charge to the jury, over Petitioner's objection, the trial court treated the element of wilfulness as follows:

> A defendant acts unlawfully if it willfully and knowingly performs conduct forbidden by the statute. In this context, conduct that is done willfully and knowingly is conduct that is done deliberately and voluntarily. To prove a violation of the Taft-Hartley Act, the government need not prove that a defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate that statute. It is enough to satisfy this element if the government proves beyond a reasonable doubt that the defendant's officers or employees requested, demanded, received or accepted or agreed to accept or receive money or some other thing of value which they knew

> was from an employer of members of the defendant or of workers who would be admitted to membership by the defendant and they requested, received or accepted the money or thing of value voluntarily, not because of mistake, accident or inadvertence.
>
> Thus, it is not necessary for the government to prove that anyone in the union thought that he or she was doing anything wrong or illegal. To satisfy this element, the government need only prove that the officers or employees of the union knew that they were requesting, demanding, receiving or accepting or agreeing to receive or accept money from employers of employees that the defendant represented.
>
> . . . .
>
> To put it more simply, to satisfy this element of unlawfully, willfully and knowingly, it is enough for the government to prove beyond a reasonable doubt that the defendant's officers or employees requested, received or accepted money with knowledge that he was requesting, receiving or accepting money, and that the person who was giving him the money was an employer of employees that the union represented.

Petitioner was thereafter convicted and sentenced to fines totalling $200,000.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for two reasons: (I) There is conflict and confusion among the Circuit Courts on the issue here presented; and (II) The Second Circuit decision misinterprets Congressional intent on the issue here presented.

I. There is Conflict and Confusion Among the Circuit Courts on the Issue Here Presented

The Second Circuit has consistently held that Section 186(d) creates a non-*mens rea* offense. See: *United States v. Overton*,

470 F.2d 761, 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973); *United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942, 385 U.S. 814 (1966).[2] In its decision below, the court said that it saw "no reason to depart from these established precedents." But reasons there are, since other Circuit Courts interpret the statute by the beat of a different drummer.

In *United States v. Inciso*, 292 F.2d 374, 380 (7th Cir.), *cert. denied*, 368 U.S. 920 (1961), which dealt with the very section involved here (and which was noted but rejected by the Second Circuit in *Overton*) the Seventh Circuit stated that:

> Knowledge or awareness of the law is generally irrelevant in proving *mens rea* in major felony convictions. Further, in certain "public policy" crimes, strict liability is imposed. However, in many such crimes, the sanction is limited to a fine or short jail term. Here, on the contrary, a fine of $10,000 per violation and a year's imprisonment can be imposed for disregarding the provisions of Section 186(b) and (d). We hold that the term "willfully violates" in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section.

That holding is squarely in conflict with that of the Second Circuit.[3] The Tenth Circuit is in accord with the Seventh. In *Korholz v. United States*, 269 F.2d 897, 903 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960), it described as accurate the following jury instructions under Section 186 (b):

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[2] The Third Circuit is in accord. See *United States v. Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972).

[3] Although the Seventh Circuit seemed to retreat from this holding in *United States v. Keegan*, 331 F.2d 257, 261-62 (7th Cir.), *cert. denied*, 379 U.S. 828 (1964), it clearly returned to that principle in *United States v. Kaye*, 556 F.2d 855, 863-64 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977). See also *United States v. Simpson*, 561 F.2d 53, 61-62 (7th Cir. 1977) where, although dealing with a different statute, the Seventh Circuit cited both *Keegan* and *Kaye* for the proposition that wilfulness is present if a reasonable man would have been aware that his conduct would likely be illegal. *(footnote continued.)*

> Now, the word "*wilfully*" as used in the statute and in the indictment and in these instructions connotes an intentional violation of the law, and you are advised, ladies and gentlemen of the jury, that a defendant who actually does violate the provisions of law here involved would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not.[4]

Good faith, under this charge, is a defense.[5] We suggest that only the strongest possible showing of a contrary Congressional

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If a union official whose duty it is to avoid conflicting loyalties accepts personal benefits from employers with whom he may deal on behalf of the union, it would be proper to say that he should reasonably believe that his conduct is likely to be illegal. We note that here, on the contrary, the improper payments went not to Petitioner's officials but directly into its treasury.

[4] With respect to the concept of making reasonable efforts to determine whether the plan being followed would or would not violate the law, we note that here the trial court rejected, as irrelevant, Petitioner's offer to prove that before the plaque rental plan was implemented, one of Petitioner's officers had presented a written version of the plaque lease to counsel for Petitioner who, after making some changes in it, returned it to the officer without even hinting that the plan might violate the law.

[5] In further support of our claim that the Circuit Courts are in conflict and confusion on the "good faith" issue, we ask this Court to consider that:

(a) The Eighth Circuit has stated that it is "doubtful" whether proof of an evil intent is necessary under the statute. *Brennan v. United States*, 240 F.2d 253, 265 (8th Cir.), *cert. denied*, 353 U.S. 931 (1957);

(b) The Second Circuit itself has stated that the rationale of the doctrine that ignorance of the law is no excuse is "severely undercut" when applied to a *malum prohibitum* statute. *United States v. Mancuso*, 420 F.2d 556, 559 n.5 (2d Cir. 1970);

(c) The Fifth Circuit Pattern Jury Instructions (Criminal Cases) include the element of bad faith in the definition of the term "willfully." See p. iv of those Instructions; and

(d) The Government itself recognizes that the Circuit Courts differ in their interpretation, by referring to some decisions (e.g., *Ricciardi*) as a "less restrictive interpretation" of the word "willfullness." See United States Attorneys' Manual, Title 9—Criminal Division, Ch. 132, p. 35 (1977).

intent should justify a judicial repudiation of a good faith defense to a charge of violating Section 186.[6]

II. The Second Circuit Decision Misinterprets Congressional Intent on the Issue Here Presented

There is a starkly ironic contrast between this Court's decision in *Morissette v. United States*, 342 U.S. 246 (1952), and the decision we seek to have reviewed. In *Morissette*, this Court construed a penal statute which *failed* to use the word "willfully" and refused to read into it a Congressional intent to impose strict liability. Here, the Second Circuit has found a Congressional intent to inject strict liability concepts into a statute which specifically uses the word "willfully."

Far more recently than in *Morissette*, this Court dealt with *mens rea* and Congressional intent in *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-438 (1978), as follows:

> While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in which Congress has created and this Court has recognized such offenses, . . . attest to their generally disfavored status. . . . Certainly far more than the simple omission of the appropriate phrase from the

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[6] If, as the Second Circuit says, Section 186(d) is a non-*mens rea* offense, then so is the RICO statute (18 U.S.C. §§1961-68) when based, as well it may be, upon two violations of that section within a ten-year period. The Second Circuit, in considering the use of violations of Section 186(b) as the predicate offenses for a RICO conviction, has held that no greater *mens rea* is required to violate RICO than is required to violate the underlying offenses. *United States v. Scotto*, 641 F.2d 47, 55 (2d Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct. 3109 (1981). Thus, at least for the moment in the Second Circuit, a union official or an employer who has committed two violations of Section 186 within ten years—even if he did so in reliance upon the advice of labor counsel most eminent and was blissfully unaware of any wrongdoing—could be subjected to a non-reviewable sentence of twenty years. Such a sentence, we submit (although not ordinarily reviewable on the ground of excessiveness), would raise serious issues under the Eighth Amendment's prohibition against cruel and unusual punishment. See *Rummel v. Estelle*, 445 U.S. 263 (1980). That such issues might arise under the Second Circuit's view of Section 186(d) demonstrates, we submit, the fallacy of that view.

> statutory definition is necessary to justify dispensing with an intent requirement.

This Court, in *Gypsum* at 438, also referred to its "generally inhospitable attitude to non-*mens rea* offenses."

We do not quarrel with the proposition that, whether Congress defines an offense with or without words of mental culpability, it has the constitutional power, under certain circumstances, to penalize acts innocently done. The Second Circuit, however, assumed that, even though Congress chose to insert "willfully" into the words defining the offense,[7] its *actual* intent was to create a strict liability offense *without* a *mens rea* requirement.[8] We respectfully submit, however, that the legislative history of the statute not only fails to support but actually refutes such an imputed intent.

Section 186 had its genesis in the Byrd amendment to the labor-disputes bill of 1946 (H.R. 4908), which was almost its duplicate except that the maximum term of imprisonment was "not more than 6 months. . . ."[9] 92 Cong. Rec. 5522. That act was vetoed by President Truman on June 11, 1946. See: 92 Cong. Rec. 6674-78.

The following year the Labor Management Relations Act was passed by Congress. Section 302(d) of the Act (later codified as 29 U.S.C. §186[d]) then included, as it does now, a potential term of up to one year in prison,[10] and was offered by Senator

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[7] A time-honored principle of statutory construction holds that "in the absence of anything to the contrary, it is fair to assume that Congress used [a] word in the statute in its common law sense." *Gilbert v. United States*, 370 U.S. 650, 655 (1962).

[8] In *United States v. Ryan*, 350 U.S. 299, 305 (1956), this Court described the statute involved as one which "appears to be a criminal provision, *malum prohibitum* . . . ." There are those who believe that the words "*malum prohibitum*" automatically imply a concept of strict liability. But they are wrong. See, e.g. *United States v. Murdock*, 290 U.S. 389, 396 (1933).

[9] Had the statute ultimately been passed as thus worded, it would have created one of many "petty offenses" which have traditionally been treated differently from more serious crimes. Perhaps only such "petty offenses" may constitutionally be deemed, in appropriate cases, to involve strict liability.

[10] There appears to be no legislative history as to why the potential term of imprisonment was increased by six months over the 1946 version of the bill.

Ball as an amendment to the bill which had been reported out of the Senate Labor and Public Welfare Committee. See: 93 Cong. Rec. 4677.

That Congress deemed the Act's criminal penalties applicable solely to conscious culpable wrongdoing is evident. Senator Taft himself (chief sponsor of the bill) stated at 93 Cong. Rec. 4746 that:

> The amendment provides first that—
>
> It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees.
>
> That is, it may be said, in a case of extortion or a case where the union representative is shaking down the employer.

Extortion and shake-downs are acts surely involving mental culpability.

Nowhere during the Congressional debate on the bill did Senator Taft (or anyone else) even hint that its penal provisions were ever to be applied to conduct performed in good faith. Indeed, during the debate, Senators Ives and Morse expressed concern over the possible harshness of the penal sanctions as applied to certain relatively-innocent conduct (e.g., the giving and receiving of Christmas gifts) (*Id.*, at 4748, 4751). In the Senate Report on the bill, however, Senator Taft and four other senators stated, with respect to the amendments which included the present section (*Legislative History of the Labor Management Relations Act, 1947*, U.S. Gov't Printing Off. [Washington: 1948], Sen. Report No. 105 on S. 1126, Supplemental Views 456, 462):

> We see no reason why any one of these four amendments should be regarded as punitive or restrictive of the legitimate rights of labor unions.

We submit that the interpretation of a law which may put a morally guiltless person in prison for one year and pluck from his pocket $10,000 is surely punitive.[11]

We suggest to this Court that nothing in the legislative history of the statute supports the Second Circuit view that Congress intended the concept of wilfulness to mean less than its commonly-accepted definition—acting "voluntarily and intentionally to violate a known legal duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). Thus, it was error for the trial court to have failed to charge the jury as requested and to have precluded proof of the union's innocent purpose.

CONCLUSION

In *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960), Judge (now Justice) Blackmun summarized the factors that together can overcome the judicial reluctance to dispense with *mens rea:*

> [W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Those requirements, mentioned by Justice Blackmun in the conjunctive, are not all met in this case.

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[11] It was largely upon such a ground that the American Law Institute generally prohibited incarceration in non-*mens rea* offenses. See Model Penal Code §2.05 (Tentative Draft No. 4, 1955).

We respectfully submit that the Circuit Courts differ on the meaning of the statute and that it is wrong for a union official in New York to be judged by a far harsher standard than that used to judge his brother union officer in Chicago. This is especially so when there is not a trace of evidence in the legislative history of this statute which justifies the harsher standard.

For the foregoing reasons, the petition should be granted.

Respectfully Submitted,

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N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of September, One Thousand Nine Hundred and Eighty-one.

PRESENT:

HON. J. EDWARD LUMBARD, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge
HON. DUDLEY B. BONSAL, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

LOCAL 359, UNITED SEAFOOD WORKERS, SMOKED FISH AND CANNERY UNION
Defendant-Appellant

United States Court of Appeals Second Circuit

A. Daniel Fusaro, Clerk

FILED
SEP. 30, 1981

ORDER
81-1212

Local 359, United Seafood Workers, Smoked Fish and Cannery Union appeals from a judgment of the United States District Court for the Southern District of New York convicting it of demanding and receiving illegal labor payments in violation of 29 U.S.C. § 186(b)(1). Appellant represents workers who handle fish in New York City's Fulton Fish Market. Beginning in 1975, it "rented" small cardboard signs bearing the union seal to wholesale fish companies at a yearly rate of $300. Between

* Of the Southern District of New York, sitting by designation.

1978 and 1980, forty-six wholesale companies paid Local 359 over $66,000 for the signs.

The trial court instructed the jury in substance that the Government need not prove that the defendant knowingly and intentionally violated the law or acted with bad purpose. Appellant contends that the court should have charged that the Government had to prove that appellant deliberately violated or wrecklessly disregarded the provisions of section 186. Appellant concedes, however, that the charge it requested has been rejected by this Court on a number of occasions. *See United States v. Overton*, 470 F.2d 761, 767 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973); *United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966). We see no reason to depart from these established precedents.

Appellant argues that, because violations of section 186 could be predicate offenses for a violation of the Racketeer Influenced and Corrupt Organizations Act, (RICO), 18 U.S.C. §§ 1961-1968, Congress must have intended that a defendant could not be guilty unless it had criminal intent. However, appellant was not charged with a RICO violation, and we find no relevance in the discussion of that Act. Moreover, we cannot impute the intent of the 91st Congress which enacted RICO to the 80th Congress which enacted section 186. *Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968).

The judgment of conviction is affirmed.

Hon. J. Edward Lumbard

Hon. Ellsworth A. Van Graafeiland

Hon. Dudley B. Bonsal